Nos. 90-1266 and 90-1262

In the Supreme Court of the United States

OCTOBER TERM, 1991

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

STATE OF ARKANSAS, ET AL., PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY

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Respondents and their supporting amici assert that EPA's interpretation of the federally approved Oklahoma water quality standards is not entitled to judicial deference because it is not reasonable.[1] That

[1] Oklahoma also urges the reasonableness of its own current interpretation of the federally approved standard (Br. 31-39), apparently on the assumption that it is entitled to deference on that basis. As we explain in our opening brief (at

assertion is based largely on two arguments: that EPA's interpretation is inconsistent with its own prior interpretations of the model standards on which the state standard is based, and that the interpretation is inconsistent with the governing statute. Oklahoma Wildlife Federation Br. 11-14; Oklahoma Br. 32-37; NRDC Br. 14-19, 23-24. Neither argument has merit.

1. In arguing that EPA has acted inconsistently with its prior interpretations of the model antidegradation provisions ~~—particularly the Tier III provisions—~~particularly the Tier III provisions applicable to "outstanding national resource waters" (ONRW) —respondents and amici overlook the central issues confronting EPA in determining whether the Fayetteville discharge would comply with the Oklahoma antidegradation policy applicable to the Illinois River at the point where it becomes an ONRW. In the first place, the Fayetteville discharge is not directly into the ONRW; Fayetteville will discharge effluent into a tributary 40 miles upstream from the boundary of the ONRW at the Oklahoma state line. Thus, EPA policy statements interpreting the model antidegradation policy as generally prohibiting new point source discharges directly into waters designated as ONRWs [2] are entirely consistent with its position

16-21), the relevant issue under the Clean Water Act is the reasonableness of EPA's interpretation, not that of the downstream State.

[2] See Memorandum from James Rogers, Associate General Counsel, Water and Solid Waste Division, to Kenneth M. Mackenthun, Director, Criteria and Standards Division (Aug. 15, 1979), cited at Oklahoma Br. 36; Wildlife Br. 12-13; NRDC Br. 23; W. Diamond, Director, Standards & Applied Sciences Division, EPA, *Newsletter: Water Quality Criteria*

concerning the Fayetteville permit. See Region IV, Questions and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resource Waters at 2 (Apr. 20, 1989) ("New point source discharges are allowed to waters tributary to ONRW's as long as the discharge will not result in a lowering of water quality as the tributary waterbody enters the ONRW basin."). Treating a discharge into an upstream tributary of an ONRW as the equivalent of a discharge directly into the protected waterbody is simply not supported by the regulatory language or any interpretation authored by the EPA.[3]

The second factor ignored by the respondents and amici is the interstate nature of this controversy. Oklahoma has designated the Illinois River above the 650-foot elevation of Lake Tenkiller as a state scenic river and has protected the water quality in that section of the river with a strict, Tier III antidegrada-

& Standards (June 1991), cited at Wildlife Br. 14; NRDC Br. 24.

[3] Respondents cite (Oklahoma Br. 35) guidance issued by EPA in 1985 stating that new or expanded activities in high quality waters would be subject to the antidegradation provisions because "such activities *would presumably* lower water quality" (emphasis added). EPA, Questions and Answers on Antidegradation at 6 (1985). But this statement does not take the position that all new activities leading to discharges into ONRW waters are to be flatly prohibited; it simply suggests a rebuttable presumption that such activities will lower water quality, and thus run afoul of the antidegradation policy. Where, as here, the record shows that a new activity miles upstream will not lower water quality in an ONRW, and where the same record shows that loadings from existing sources will be substantially decreased, the presumption in question does not in terms apply and would, in any event, be rebutted.

tion requirement. Arkansas has not designated the upstream portion of the Illinois River and its tributaries as an ONRW and has not chosen to apply an equally strict antidegradation requirement to those waters. The imposition of a strict no-new-point-source discharge requirement on an Arkansas discharger as a prophylactic measure to protect the Oklahoma ONRW water quality would override the permissible Arkansas policy choice not to designate its Illinois River waters as an ONRW. Oklahoma may choose to protect its scenic river by barring all new discharges in Oklahoma into tributaries of that river regardless of actual effect on water quality at the boundary of that ONRW. 33 U.S.C. 1370(1). But it is quite another question whether such a policy may be imposed by Oklahoma on Arkansas; certainly EPA did not approve the designation of the Oklahoma portion of the Illinois River as an ONRW with such drastic interstate effects in mind.

This does not mean that EPA or Arkansas was free to ignore the Oklahoma antidegradation policy applicable to the Oklahoma portion of the Illinois River. Instead, the central question posed is how to interpret and apply that policy to the Fayetteville discharge 40 miles upstream of the boundary of the ONRW and in another State. Oklahoma's water quality standards by their terms bar any new discharge of pollutants that will result in "degradation" of water quality in the ONRW.[4] The Oklahoma standards do not define

[4] In suggesting that the plain meaning of the Oklahoma antidegradation standards forbids any new discharge of waste into a scenic river, amici supporting the Oklahoma respondents erroneously assume that a policy of no *degradation* is the same as an absolute requirement barring any *discharges* of pollutants. See, *e.g.*, NRDC Br. 19-20. "Discharge" and "degradation" are two distinct concepts. Indeed, Oklahoma's water quality standards on their face distinguish between a "discharge" and whether the discharge causes a "degradation." Section 5 prohibits discharges into specified waters "except under conditions described in Section 3," and the ONRW provision of Section 3 prohibits degradation, not all discharges. Oklahoma Water Quality Standards §§ 3 and 5 (1982); 90-1266 Pet. App. 96a-97a. Thus, Sections 3 and 5, read together, prohibit only discharges that degrade ONRW water quality.

Similarly, the brief of amicus Senator Nickles, joined by Senator Boren, argues that EPA's model rule formerly must have constituted a complete prohibition on degradation because it had to be altered to allow for temporary degradation resulting from construction. Br. 17-18. We do not dispute that both the Oklahoma standard and the EPA model on which it is based plainly prohibit degradation of ONRWs. The dispute here is instead over what constitutes degradation —*i.e.*, whether it is appropriate, in determining whether there will be a degradation, to consider whether a particular discharge will have an adverse effect on the relevant water quality parameters. There is no support in the Oklahoma standard or EPA's model rule for the Tenth Circuit's outright prohibition on discharges regardless of whether a detectable impact will result.

"degradation," and EPA has not adopted a general definition of the term other than to state that there should not be a "lowering of water quality." See EPA Br. 24 & n.31. In these circumstances, EPA reasonably (hence, permissibly) concluded that there will not be a degradation of water quality in the Oklahoma portion of the Illinois River because there will be no detectable impact on water quality at the Oklahoma boundary from the Fayetteville discharge.[5]

[5] The Oklahoma respondents also challenge the effect on already degraded waters of EPA's interpretation of the Oklahoma standard. The more polluted a river, they argue, the less likely that a new discharge would be prohibited under

2. Respondents correctly assert that one of the goals of the Clean Water Act is eventual elimination of the discharge of all pollutants, and attainment of high water quality standards in the interim. On this basis, they argue that EPA's determination that the Oklahoma antidegradation standard requires a detectable impact (of remote discharges) in the protected waterway is contrary to the policy of the Act. Oklahoma Br. 15, 21-25; Oklahoma Wildlife Federation Br. 3, 5-10. That conclusion, however, scarcely follows from the premise.[6] In any event, the declaration of goals and policy at the outset of the Act

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EPA's approach because the discrete harmful effect of the discharge would become that much less measurable. Oklahoma Br. 22. This assertion oversimplifies the scientific inquiry and does not accurately portray EPA's position. A river may lose its capacity to assimilate pollutants at higher pollution levels, so that more pollution will result in an even greater harmful effect and thus be prohibited under the traditional view of antidegradation espoused by EPA in this case. In any event, the application of antidegradation standards to a particular waterway involves extremely complex technical and scientific analysis. Oklahoma's oversimplified observation illustrates the importance of reserving decisions concerning such applications to the expert regulatory agencies; they should not be addressed *de novo* by the reviewing court. See, *e.g.*, *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

[6] Whether or not the Clean Water Act requires a showing of "harm" for a discharge to be prohibited absent a permit, the EPA reasonably interpreted the Oklahoma standards to prohibit the issuance of permits that would cause degradation, not to ban all remote discharges. As the court recognized in *NRDC* v. *Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977), the Clean Water Act embodies "a plain Congressional intent to require permits in any situation of [discharge of] pollut[ants] from point sources"; no showing of harm is required.

states objectives, not precise statutory requirements. "[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982).

Specifically, the regulatory scheme actually devised by Congress in the Clean Water Act does not require a "zero discharge" policy for pollutants, but instead reflects a "practical recognition of the economic, technological, and political limits on total elimination of all pollution from all sources." *Ibid.* Thus, although Section 301(a) of the Act (33 U.S.C. 1311(a)) announces a general prohibition of the discharge of pollutants into the nation's waters, Section 402(a) allows such discharges pursuant to a permit (33 U.S.C. 1342(a)). The very section that states the goals of the Act directs that they are not to override or otherwise alter the specific provisions contained elsewhere in the Act; instead, the specified objectives are to be read "consistent with the provisions of this [Act]" (33 U.S.C. 1251(a)). Moreover, "[t]he legislative history of the 1977 amendments further suggests caution in indiscriminately relying on the § 101(a) 'goals' to alter the meaning of specific provisions of the Act." *National Wildlife Federation* v. *Gorsuch*, 693 F.2d at 181 (citing S. Rep. No. 370, 95th Cong., 1st Sess. 43-44 (1977), upon which respondents rely).

3. Respondents and their supporting amici also address the issue raised in the Arkansas petition (No. 90-1262) concerning the effect under the Act of the water quality standards of a downstream State on an out-of-state discharge. We did not raise this issue in our petition because the court of appeals decided it in accordance with our position, to which we adhere. Although Arkansas also raises, and respondents and amici address, the related question of the extent of

EPA's authority to modify a downstream state standard in the interstate context, we submit that the Court need not reach that issue in this case, since EPA has never asserted any such authority; it certainly did not so justify its issuance of the Fayetteville permit in this case. See EPA Br. 18-19 n.22. Arguments concerning the scope of the agency's authority to modify downstream state standards should be addressed by EPA in the first instance and in a concrete setting. Until it has done so, judicial consideration of Arkansas's theory would be premature.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed as to the questions presented in petition No. 90-1266.

Respectfully submitted.

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